

86 - 1340 ①

No. _____

Supreme Court, U.S.
FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GILBERT R. RUSSELL and CRINCO INVESTMENTS, INC.,

Petitioners,

v.

SHEARSON LEHMAN BROTHERS, INC., formerly known as
SHEARSON/LEHMAN AMERICAN EXPRESS, INC.,
and LEON BOMAR III,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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Question Presented

Whether pre-dispute agreements to arbitrate civil claims arising under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.* (1982) ("RICO"), are enforceable under the United States Arbitration Act, 9 U.S.C. § 1, *et seq.* (1982)?

Rule 28.1 List

Subsidiaries of Crinco Investments, Inc.:

Arrow Building Corp.

C & R Distributing, Inc.

El Paso Tire Center, Inc.

El Paso Truck Terminal, Inc.

Jordinns of America, Inc.

Petro, Inc.

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GILBERT R. RUSSELL and CRINCO INVESTMENTS, INC.,

Petitioners,

v.

SHEARSON LEHMAN BROTHERS, INC., formerly known as

SHEARSON/LEHMAN AMERICAN EXPRESS, INC.,

and LEON BOMAR III,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Petitioners Gilbert R. Russell and Crinco Investments, Inc., plaintiffs below, respectfully request that

(a) a writ of certiorari issue to review that part of the judgment of the United States Court of Appeals for the Fifth Circuit, entered on November 13, 1986, which affirmed in part an order of the United States District Court for the Northern District of Texas (Dallas Division) granting the respondents' motion to arbitrate petitioners' RICO claims;

(b) upon issuance of a writ of certiorari, that consideration of that part of the judgment of the Fifth Circuit granting respondents' motion to arbitrate petitioners' RICO claims be withheld pending the issuance of this Court's opinion in *Shearson/American Express, Inc. v.*

McMahon, cert. granted, — U.S. —, 107 S. Ct. 60 (U.S. Oct. 6, 1986) (No. 86-44) ("*McMahon*"); and

(c) to the extent that the arbitrability of civil RICO claims is not resolved by this Court's decision in *McMahon*, that this Court decide this issue.

The district court granted the respondents' motion to arbitrate petitioners' claims and, on appeal, the Fifth Circuit affirmed the district court in part and ruled, *inter alia*, that pre-dispute agreements to arbitrate RICO claims are enforceable.

Opinions Below

The opinion of the Court of Appeals for the Fifth Circuit is reproduced at Appendix B hereto. The order of the United States District Court for the Northern District of Texas (Dallas Division) is reproduced at Appendix C hereto.

Jurisdiction

The judgment of the court of appeals was entered on November 13, 1986. A copy of the judgment is reproduced at Appendix D hereto. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Statutory Provisions Involved¹

The relevant statutory provisions are:

United States Arbitration Act, Section 2, 9 U.S.C. § 2 (1982).

Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*

¹ The text of these provisions is reproduced at Appendix A.

Statement of the Case

Statement of Facts

From November, 1982 through May of 1984, Petitioners Gilbert R. Russell and Crinco Investments, Inc. each maintained separate securities accounts and commodities accounts at the Fort Worth, Texas office of Respondent Shearson Lehman Brothers, Inc. ("Shearson"). There were four (4) separate accounts.

Waylon Max Nimmo, Shearson's registered representative and a defendant in the district court below, induced the petitioners to open the accounts and transfer their shares of OKC stock from another brokerage firm to Shearson. That was done on the basis of specific representations that such OKC stock would not be utilized to margin transactions in the petitioners' commodities accounts nor would it be liquidated to margin transactions in petitioners' securities accounts except upon prior notice to the petitioners and upon their failure to maintain the required margin after petitioners' receipt of said notice.

Beginning in or about December of 1983 and continuing through May of 1984, in connection with the petitioners' securities and commodities accounts, Nimmo and Respondent Leon Bomar III, the branch manager of Shearson's Fort Worth office, engaged in a scheme to defraud the petitioners by knowingly and intentionally:

- (a) trading in petitioners' commodities accounts without authorization;
- (b) withholding confirmation of transactions in the petitioners' commodities and securities accounts;
- (c) selling petitioners' collateral stock without prior notice to or consent of the petitioners;
- (d) concealing the sale of petitioners' collateral stock;

- (e) misrepresenting the equity of, and positions in, petitioners' securities accounts;
- (f) causing funds to be transferred from the petitioners' securities accounts to the petitioners' commodities accounts to conceal losses caused by the unauthorized trading; and
- (g) churning and otherwise manipulating petitioners' accounts.

As a direct consequence of the foregoing, petitioners sustained combined losses in their securities and commodities accounts in excess of \$4,000,000.00.

Course of Proceedings

On November 22, 1985 Petitioners Gilbert R. Russell and Crinco Investments, Inc. filed suit in the United States District Court for the Northern District of Texas (Dallas Division) against Respondents Shearson Lehman Brothers, Inc., Leon Bomar III and Defendant Waylon Max Nimmo alleging violations of the Securities Act of 1933, 15 U.S.C. § 77a, *et seq.* ("1933 Act") (Count I); the Securities Exchange Act of 1934, 15 U.S.C. § 78a, *et seq.* ("1934 Exchange Act") (Count II); the Commodity Exchange Act, 7 U.S.C. § 1, *et seq.* (Counts IV, V and VI); the Racketeer Influenced and Corrupt Organizations Act (Count III); and various Texas state law (Counts IX, X, XI) and common law claims (Counts VII, VIII and XII).

On January 14, 1986, the respondents moved to dismiss various counts, to compel arbitration of petitioners' remaining claims and to stay all district court proceedings pending the outcome of arbitration.

On March 10, 1986, the district court issued an order which dismissed Counts I and IX of the complaint, quashed

petitioners' outstanding discovery requests, stayed all judicial proceedings and referred all of petitioners' remaining claims to arbitration. Petitioners appealed this order pursuant to 28 U.S.C. § 1292(a)(1) and, on November 13, 1986, the Court of Appeals for the Fifth Circuit reversed the district court with respect to the dismissal of petitioners' claims under the 1933 Act; reversed the district court with respect to the requirement that petitioners' claims under the 1934 Exchange Act be arbitrated; vacated the district court's stay of judicial proceedings as to the petitioners' 1933 Act and 1934 Exchange Act claims; and affirmed the district court's order requiring the petitioners to arbitrate their RICO and Commodity Exchange Act claims. *See* Appendix B at A-12.

Reasons for Granting the Writ

The decision by the Court of Appeals for the Fifth Circuit compelling the arbitration of petitioners' RICO claims is in direct conflict with the decisions of the Courts of Appeals for the First, Second and Eleventh Circuits.²

Moreover, implicit in the congressional scheme to afford an express private statutory remedy under RICO to recompense persons and businesses injured by a pattern of racketeering activity are overwhelming public policy considerations unsuitable for unscrutinized determination by arbitrators. Petitioners respectfully submit that their claims arising under the express civil provisions of RICO must be resolved in a federal judicial forum.

² *Page v. Moseley, Hallgarten, Estabrook & Weeden, Inc.*, 806 F.2d 291 (1st Cir. 1986); *Sevinor v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 807 F.2d 16 (1st Cir. 1986); *McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94 (2d Cir. 1986), *cert. granted*, — U.S. —, 107 S. Ct. 60 (U.S. Oct. 6, 1986) (No. 86-44); *Tashea v. Bache, Halsey, Stuart, Shields, Inc.*, 802 F.2d 1337 (11th Cir. 1986).

I.

To the Extent the Question Is Not Resolved in *Shearson/American Express, Inc. v. McMahon*, No. 86-44, This Court Should Grant Certiorari to Determine Whether Congress Intended That RICO Claims Be Resolved Only in a Federal Judicial Forum.

A. Congress Intended to Create an Exception to the United States Arbitration Act for Civil Claims Arising Under RICO.

This Court has consistently held that the creation of a special statutory remedy by Congress renders a private agreement to arbitrate a federal statutory claim unenforceable. See *McDonald v. City of West Branch, Michigan*, 466 U.S. 284, 290-92 (1984) (Civil Rights Act of 1871); *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 743-45 (1981) (Fair Labor Standards Act); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56-58 (1974) (Title VII of the Civil Rights Act of 1964); *Wilko v. Swan*, 346 U.S. 427, 438 (1953) (Securities Act of 1933).

Similarly, RICO's provision for an express private right of action clearly evinces that Congress intended that such claims be adjudicated only in a federal judicial forum. 18 U.S.C. § 1964(c). It is respectfully submitted that this conclusion is entirely consistent with this Court's recent decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, — U.S. —, 105 S. Ct. 3346 (1985).

The principal issue before this Court in *Mitsubishi* was whether claims arising under the Sherman Act, 15 U.S.C. § 1, *et seq.*, in an international commercial transaction are arbitrable pursuant to Section 2 of the United States Arbitration Act, 9 U.S.C. § 2 (1982). In concluding that such claims are subject to the United States Arbitration Act, this Court stated:

that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, *even assuming that a contrary result would be forthcoming in a domestic context.*

Mitsubishi, 105 S. Ct. at 3355 (emphasis added).

Similarly, in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), this Court ruled that claims arising under section 10(b) of the 1934 Exchange Act can be compelled to arbitration if the contractual provision arises from an international business transaction.

The common denominator in *Mitsubishi* and *Scherk* were the freely negotiated contracts which included forum-selection clauses to arbitrate disputes abroad. In *Mitsubishi*, the parties agreed that "[a]ll disputes, controversies or differences . . . shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association." *Mitsubishi*, 105 S. Ct. at 3349. In *Scherk* the parties agreed that "any controversy or claim . . . would be referred to arbitration before the International Chamber of Commerce in Paris, France" *Scherk v. Alberto-Culver Co.*, 417 U.S. at 508.

Admittedly, in the international commercial arena, the method of resolving foreseeable disputes and the ability to agree on a neutral forum may impact not only upon salient contract terms, such as price, but also upon the overall acceptability of the transaction. See *Alberto-Culver Co. v. Scherk*, 484 F.2d 611, 617 (7th Cir. 1973) (Stevens, J., dissenting), *rev'd*, *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974). These concerns and those of international

comity and the congressional implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201, *et seq.*, prompted this Court to compel Soler Chrysler-Plymouth and Alberto-Culver Company to arbitrate their disputes. This Court acknowledged, however, that a contrary result might be forthcoming in a case such as this one which presents a purely domestic dispute governed by federal law. *Mitsubishi*, 105 S. Ct. at 3355.

The fact that a civil RICO action is an express private right created by Congress is critical and must be accorded great deference. Indeed, the RICO statute has nearly the identical statutory characteristics that compelled this Court in *Wilko v. Swan* to rule claims arising under the 1933 Act nonarbitrable: the express private right of action, *compare* 18 U.S.C. § 1964(c) (1982) with 15 U.S.C. § 77l (1982); nationwide service of process and a wider choice of venue, *compare* 18 U.S.C. § 1965 (1982) with 15 U.S.C. § 77v (1982); and a “special right” to recover that differs substantially from the common law.³ *Wilko v. Swan*, 346 U.S. at 431.

Moreover, this Court has acknowledged that arbitration cannot provide an adequate substitute for a judicial proceeding in protecting certain federal statutory rights. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 105 S. Ct. 1238, 1243 (1985). “The loss of the proper judicial forum carries with it the loss of substantial rights.” *Scherk v. Alberto-Culver Co.*, 417 U.S. at 532 (Douglas, J., dissenting).

Although the 1933 Act contains a “non-waiver clause” which this Court has held prohibits arbitration of 1933

³ The text of these provisions is reproduced at Appendix A.

Act claims, *see* 15 U.S.C. § 77n (1982),⁴ the absence of a non-waiver clause from the RICO statute does not preclude non-arbitrability in this particular instance. In a typical RICO scenario, a non-waiver clause would be unnecessary. Until this Court's recent interpretation of RICO's salient civil provisions in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S. Ct. 3275 (1985), RICO's target in general was criminal activity, the adjudication of which is clearly not arbitrable.⁵

Moreover, Congress would not have anticipated that racketeers and their victims would agree in advance to arbitrate any disputes, thereby necessitating a precautionary non-waiver clause in the statute.

B. The Quasi-criminal Nature of and Public Policy Considerations Inherent in Civil RICO Actions Mandate Adjudication by Article III Judges.

This Court has acknowledged the quasi-criminal nature of the RICO statute, *see Sedima*, 105 S. Ct. at 3283, which mandates that petitioners pursue their express civil remedy only in a federal judicial forum. By definition, "racketeering activity" includes indictable federal offenses. 18 U.S.C. § 1961. Thus, the unlawful predicate acts underlying a RICO claim cannot lend themselves to arbitration. *Page v. Moseley, Hallgarten, Estabrook & Weeden*, 806 F.2d 291, 298-99 (1st Cir. 1986).

Moreover, the momentous public policy considerations at issue weigh heavily against the arbitrability of civil RICO claims. As stated by the Second Circuit in *McMahon*

⁴ The text of this provision is reproduced at Appendix A.

⁵ In fact, with the exception of one section pertaining to the purchase of prison-made products by federal departments, *see* 18 U.S.C. § 4124 (1982), Title 18 of the United States Code entitled "Crimes and Criminal Procedure" does not contain a "non-waiver" clause or any other statutory provision pertaining to arbitration.

v. Shearson/American Express, Inc., 788 F.2d 94 (2d Cir.), cert. granted, — U.S. —, 107 S. Ct. 60 (U.S. Oct. 6, 1986) (No. 86-44):

Enforcement of the RICO statute is particularly appropriate in a judicial forum because of strong policy concerns, the need for development of the record, and judicial clarification and resulting consistency in resolving disputes under this relatively new statute.

788 F.2d at 98-99. -

Allegations of fraud in connection with the sale of securities by national brokerage firms and their employees have a significant impact on society at large. More than fifty years ago Congress enacted the 1933 Act and the 1934 Exchange Act to protect the investing public by establishing higher standards of conduct in the securities industry. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389 (1983). Whereas a federal district judge must enforce legislative policy, an arbitrator has no such obligation. See *Alexander v. Gardner-Denver Co.*, 415 U.S. at 56-57. The special role of the arbitrator is only to effectuate the intent of the parties. *Id.* Thus, in rendering a decision, an arbitrator can legally ignore the legislative considerations which gave rise to legislation intended to protect the investing public.

In addition, because of the informality of arbitration, the rights and procedures common to civil trials, such as discovery, compulsory process and cross-examination, are often unavailable or severely limited. *Id.* at 57. Furthermore, since arbitrators are not obliged to articulate or record their reasons for an award, there would be no method of review or ensuring that Congress' "express admonition that RICO is to 'be liberally construed to effectuate its remedial purposes'" would be preserved. *Sedima*, 105 S. Ct. at 3286. The remedial purposes intended by

Congress are most evident by RICO's provision for an express private right of action for those injured by a pattern of racketeering activity. *Id.* at 3283 n.10 and 3286.

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that (a) a writ of certiorari issue in this case to review the judgment of the United States Court of Appeals for the Fifth Circuit; (b) upon issuance of the writ of certiorari, that consideration of the judgment of the Fifth Circuit be withheld pending the issuance of this Court's decision in *Shearson/American Express, Inc. v. McMahon*; (c) this case be remanded to the Fifth Circuit for the entry of a judgment in accordance with *McMahon*; and (d) to the extent the arbitrability of civil RICO claims is not resolved in *McMahon*, that this Court resolve that issue in the instant case.

Dated: New York, New York
February 10, 1987

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APPENDICES



APPENDIX A

Statutory Provisions Involved

United States Arbitration Act

9 U.S.C. § 2:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Racketeer Influenced And Corrupt Organizations Act (“RICO”)

18 U.S.C. § 1964:

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1965:

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

Appendix A—Statutory Provisions Involved

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpoenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpoena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

Securities Act of 1933

Section 12, 15 U.S.C. § 77l:

Any person who—

- (1) offers or sells a security in violation of section 77e of this title, or
- (2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraph (2) of subsection (a) of said section),

Appendix A—Statutory Provisions Involved

by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

Section 14, 15 U.S.C. § 77n:

Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.

Section 22, 15 U.S.C. § 77v:

(a) The district courts of the United States, and the United States courts of any Territory, shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and

Appendix A—Statutory Provisions Involved

Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.

APPENDIX B

Opinion of United States Court of Appeals

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 86-1224
Summary Calendar

GILBERT R. RUSSELL and CRINCO INVESTMENTS, INC.,
Plaintiffs-Appellants,
versus

SHEARSON LEHMAN BROTHERS, INC., LEON P. BOMAR, III,
and WAYLON MAX NIMMO,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Texas
(Docket No. CA-3-85-2335-R)

(November 13, 1986)

Before CLARK, Chief Judge, REAVLEY and WILLIAMS, Circuit
Judges.

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

Appendix B—Opinion of United States Court of Appeals

PER CURIAM:

Gilbert R. Russell and Crinco Investments, Inc. appeal from a district court order dismissing their claim under the 1933 Securities Act and compelling arbitration of their remaining claims. We affirm in part, reverse in part, vacate in part, and remand for further proceedings.

I.

From November 1982 through May 1984 Russell and Crinco each maintained separate securities accounts and commodities accounts at Shearson Lehman Brothers, Inc. Russell and Crinco filed suit in November 1985 alleging that from December 1983 through May 1984, Waylon Nimmo, account executive at Shearson, and Leon Bomar III, Shearson's branch manager, engaged in various actions to defraud Russell and Crinco. The suit alleged violations of the federal securities laws, the Racketeer Influenced and Corrupt Organizations Act (RICO), the Commodity Exchange Act, as well as various state law claims. Russell and Crinco sought recovery for losses of \$1,948,433.03 sustained on their securities accounts with Shearson and losses of \$2,054,093.74 sustained on their commodities accounts.

The defendants filed a motion to dismiss, to compel arbitration, and to stay proceedings pending arbitration. They contended that the plaintiffs' claim under the Securities Act of 1933 was barred by the statute of limitations and that Russell and Crinco had agreed to arbitrate all other claims. The district court granted the defendants' motion. It concluded that the 1933 Act claim should be dismissed because the statute of limitations clearly had run. The

Appendix B—Opinion of United States Court of Appeals

district court then compelled arbitration of the other claims, including plaintiffs' claims under the Securities Exchange Act of 1934, RICO, and the Commodity Exchange Act. As no claims were then before it, the district court stayed its proceedings pending arbitration and quashed plaintiffs' discovery requests. Russell and Crinco appeal.¹

II.

Russell and Crinco initially argue that the district court erred by dismissing their claim under the 1933 Securities Act as untimely. Section 13 of the 1933 Act provides:

No action shall be maintained to enforce any liability created under section 77k or 771(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence. . . . In no event shall any such action be brought to enforce a liability created under section 77k or 771(2) of this title more than three years after the security was bona fide offered to the public. . . .

15 U.S.C. § 77m. Plaintiffs filed suit in November 1985, one year and six months after they incurred the final losses from defendants' alleged fraud. The action was timely under the three-year absolute bar contained in section 13. *Summer v. Land & Leisure, Inc.*, 664 F.2d 965, 968 (5th Cir. 1981) (Unit B), *cert. denied*, 458 U.S. 1106 (1982).

¹ The district court also dismissed one of the plaintiffs' state law claims and compelled arbitration of the remaining claims. Russell and Crinco do not appeal from that portion of the district court's order.

Appendix B—Opinion of United States Court of Appeals

But unless Russell and Crinco in the exercise of due diligence could not have discovered the alleged fraud until November 1984, six months after they suffered their final losses, their claim is barred by the one-year time limitation.

The district court dismissed plaintiffs' claims solely on the basis of the facts alleged in their complaint. A motion to dismiss for failure to state a claim should be granted only if "it appears to a certainty that the plaintiff would be entitled to no relief under any set of facts which could be proved in support of the claim." *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1353 (5th Cir. 1985); *Watts v. Graves*, 720 F.2d 1416, 1423 (5th Cir. 1983). The district court did not explain its conclusion that the 1933 Act claim was untimely. Apparently the court determined that it would not have taken a reasonable person six months to discover fraud after losing over \$4 million in a short time.

Whether a plaintiff has exercised due diligence is a factual question that cannot readily be answered as a matter of law. *Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036, 1042 (10th Cir. 1980). As this court stated in *Azalea Meats, Inc. v. Muscat*, 386 F.2d 5, 9 (5th Cir. 1967) (footnote omitted):

The concept of due diligence is not imprisoned within the frame of a rigid standard; it is protean in application. A fraud which is flagrant and widely publicized may require the defrauded party to make immediate inquiry. On the other hand, one artfully concealed or convincingly practiced upon its victim may justify much greater inactivity. The presence of a fiduciary relationship or evidence of fraudulent concealment bears heavily on the issue of due diligence.

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Often the due diligence of the plaintiff is best determined at trial by the finder of fact. *See id.*

The complaint filed by Russell and Crinco does not establish when they discovered the fraud or what steps they took to determine the cause of their losses.² It does allege, however, that the defendants concealed sales of their shares, concealed losses resulting from excessive trading, intentionally withheld confirmations of transactions, intentionally withheld margin call notices, and intentionally misrepresented the equity of and positions in plaintiffs' securities accounts. The facts plaintiffs could prove in support of these allegations might establish their exercise of due diligence. We do not hold that a trial of the claim is required. Discovery or other procedures might make summary judgment appropriate. We say no more than that dismissal of the 1933 Act claim solely on the basis of plaintiff's complaint was improper.

III.

Russell and Crinco also raise several challenges to the portion of the district court's order finding their remaining claims arbitrable and staying the proceedings pending arbitration. First, both argue that the district court erred in compelling arbitration of their claims under the 1934 Securities Exchange Act and RICO. Recent decisions of this circuit have definitively settled both contentions, albeit with opposite results. We reaffirmed our rule that 1934 Act claims are nonarbitrable in *Bustamante v. Rotan Mosel, Inc.*, No. 86-2300, slip op. at 339, 340 (Oct. 17, 1986).

² Although other courts might require plaintiffs to affirmatively plead those facts, *see, e.g., Hagert v. Glickman, Lurie, Eiger & Co.*, 520 F. Supp. 1028, 1033 (D. Minn. 1981), defendants have not challenged this aspect of the Russell and Crinco complaint.

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The district court should not have compelled arbitration of the 1934 Act claim.³ Under facts similar to those in the present case, a civil RICO claim has been held arbitrable. *Mayaja, Inc. v. Bodkin*, No. 85-2762, slip op. at 671, 686 (Oct. 24, 1986). The district court properly compelled arbitration of plaintiffs' RICO claim.

Second, Russell argues that the district court erred in compelling arbitration of his Commodity Exchange Act claim because Shearson never proved that he agreed to arbitrate that claim. Shearson responds by seeking to supplement the record on appeal with a copy of Russell's agreement to arbitrate claims arising out of his commodities account. Federal Rule of Appellate Procedure 10(e) provides that "[i]f anything material to either party is omitted from the record by error or accident . . . the court of appeals, on proper suggestion or of its own initiative, may direct that the omission . . . be corrected."

The arbitration agreement clearly is material to an issue on appeal. Shearson had no opportunity to correct the omission of Russell's agreement from the record on appeal. Russell first asserted the lack of an agreement to arbitrate in his opposition to Shearson's motion to compel arbitration. That same day, the district court compelled arbitration of the claim. Russell's discovery requests were quashed before Shearson had to respond. Russell does not challenge the validity of the arbitration agreement or deny making the agreement. Russell cannot claim to be surprised by the existence of a document that he does not deny signing. We grant Shearson's motion to supplement

³ Russell and Crineo also argue that agreements to arbitrate claims under the federal securities laws are void because they violate 17 C.F.R. § 240.15c2-2(a) (1986). Consideration of this argument is unnecessary.

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the record on appeal. Based on the executed agreement, the district court properly compelled arbitration of Russell's Commodity Exchange Act claim.

Third, Russell and Crinco take issue with the stay of proceedings pending arbitration. Russell and Crinco seek to have us vacate the stay and remand the 1933 Act and 1934 Act claims for trial. The district court is the proper body to rule on whether the nonarbitrable claims should be stayed pending arbitration. *See Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 20 n.23 (1983). Because the district court stayed its proceedings on the assumptions that the 1933 Act claim was untimely and that the 1934 Act claim was arbitrable, we vacate the stay order as to those claims and remand to the district court to make those determinations in light of this opinion.

IV.

Finally, Russell and Crinco maintain that the district court erred in quashing their discovery requests. They contend that they should have been allowed discovery on the existence of Russell's agreement to arbitrate commodities claims. Because the record has been supplemented with that agreement, this contention is moot. They also contend that they should have been allowed discovery on the validity of their agreements to arbitrate federal securities laws claims. This contention has no merit. Those agreements are unenforceable as a matter of law. *See Bustamante*, slip op. at 340. The district court acted properly in quashing plaintiffs' discovery requests when all proceedings before it were stayed. This ruling is without prejudice to the right of Russell and Crinco to renew discovery requests on their 1933 Act or 1934 Act claims

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should the district court not stay those proceedings pending arbitration.

The order appealed from is:

- 1) affirmed with respect to requiring arbitration of the claims under RICO and the Commodity Exchange Act;
- 2) reversed with respect to dismissal of the claim under the 1933 Securities Act;
- 3) reversed with respect to the requirement to arbitrate the claim under the 1934 Securities Exchange Act;
- 4) vacated with respect to the stay of proceedings as to the 1933 Act and 1934 Act claims.

The cause is remanded for further proceedings consistent with this opinion.

AFFIRMED in part,
REVERSED in part, and
VACATED in part.
REMANDED.

APPENDIX C

Order of United States District Court

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION
CA3-85-2335-R**

GILBERT R. RUSSELL and CRINCO INVESTMENTS, INC.,

vs.

SHEARSON LEHMAN BROTHERS, INC., et al.

ORDER

The defendants have moved to dismiss, compel arbitration, stay proceedings, and to quash and stay discovery. Their motion to dismiss is GRANTED in part and DENIED in part, and the motion to compel arbitration is GRANTED; the motion to quash and stay discovery is GRANTED.

Dismissal. Count I must be dismissed, as the one-year statute of limitations contained in 77 U.S.C. § 77m has clearly run. Count VI will not be dismissed. Count IX will be dismissed under *Swenson v. Englestad*, 626 F.2d 421, 428 (5th Cir. 1980) (holding that sales of securities are not covered by the DTPA). Counts II, III, IV, VII, X, and XI will not be dismissed under Rule 9.

Arbitration. All of plaintiffs' remaining claims will be arbitrated. See *Frye v. Paine Webber Jackson & Curtis*,

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et al., No. CA3-83-1061-G (N.D. Tex. Dec. 26, 1985) (opinion attached).

Discovery. All discovery will be stayed pending outcome of the arbitration proceedings. Plaintiffs' discovery requests are therefore quashed.

Accordingly, the case is STAYED pending outcome of arbitration.

Signed this 10th day of March, 1986.

/s/ Jerry Buchmeyer

JERRY BUCHMEYER

United States District Judge

*Appendix C (Continued)—Memorandum Order of
United States District Court*

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NANCY C. FRYE,

Plaintiff,

vs.

PAINE WEBBER JACKSON & CURTIS, et al.,

Defendants.

MEMORANDUM ORDER

This case is before the court on the motion of defendants Paine Webber Jackson & Curtis, et al. ("Paine Webber") to compel arbitration and to stay the litigation pending arbitration. For the reasons stated below, the court is of the opinion that the motion should be granted.

1. *Background*

Plaintiff Nancy C. Frye ("Frye") opened an account with Paine Webber on June 11, 1982, transferring into that account 12,212 shares of Commodore International, Ltd. Paine Webber employees Ken George ("George") and Dean McGowan ("McGowan"), defendants herein, allegedly recommended to Frye that she open an option account with Paine Webber, proposing an elaborate scheme to use the Commodore stock to generate income. George

*Appendix C (Continued)—Memorandum Order of
United States District Court*

and McGowan reportedly assured Frye that the recommended course of action would not jeopardize her ownership of the Commodore stock. Gary Bassett ("Bassett"), Frye's consultant, allegedly agreed with the proposed scheme. Due to alleged mismanagement, Frye lost most of her Commodore stock and, since the market value of the stock appreciated, allegedly was denied the opportunity to obtain profits in excess of \$1,000,000.00.

Frye asserts claims under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), Rule 10b-5, 17 C.F.R. § 240.10b-5, and various provisions of the Securities Act of 1933, 15 U.S.C. §§ 77a *et seq.* She also asserts pending state-law claims, including statutory and common law fraud, breach of contract, breach of fiduciary duties, and negligence.

The case was tried earlier this year before the Honorable William M. Taylor, Jr. On February 21, 1985, Judge Taylor granted Paine Webber's motion for directed verdict. The case then proceeded against a remaining defendant until, upon Frye's motion, Judge Taylor granted a mistrial. The case was subsequently transferred to the undersigned for further proceedings.

II. The Arbitration Agreement

Paragraph 15 of the agreement between Paine Webber and Frye provides for arbitration of certain controversies:

Any controversy between us arising out of or relating to this contract or the breach thereof, shall be settled by arbitration, in accordance with the rules, then obtaining, of either the Arbitration Committee of the New York Stock Exchange, American Stock Exchange,

*Appendix C (Continued)—Memorandum Order of
United States District Court*

National Association of Securities Dealers or where appropriate, Chicago Board Option Exchange or Commodities Futures Trading Commission as I [Frye] may elect. I authorize you if I do not make such election, by registered mail addressed to you at your main office within fifteen (15) days after receipt of notification from you requesting such election, to make such election in my behalf. Any arbitration hereunder shall be before at least three arbitrators and the award of the arbitrators, or a majority of them, shall be final, and judgment upon the award rendered may be entered in any court, state or federal, having jurisdiction.

On April 3, 1985, counsel for Paine Webber sent a letter to Frye's counsel requesting arbitration. Neither Frye nor her counsel responded. On April 24, 1985, counsel for Paine Webber sent a letter to Frye's counsel selecting arbitration before the Arbitration Committee of the New York Stock Exchange.

Frye asserts that the arbitration paragraph does not mandate arbitration but merely provides an opportunity timely to elect arbitration. Neither party contests the applicability of the arbitration agreement to the securities claims if the court determines that they are arbitrable. Frye contends, however, that by willingly and actively participating in and seeking affirmative relief in judicial proceedings for over two years, Paine Webber has waived the right to seek arbitration of any disputes. Frye further asserts that even if the pendent state claims are found arbitrable, the claims arising under the securities acts are not arbitrable as a matter of federal law.

*Appendix C (Continued)—Memorandum Order of
United States District Court*

III. *Analysis*

A. *The Arbitration Act*

9 U.S.C. § 2 provides for the validity and enforceability of arbitration agreements:

A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The Arbitration Act evinces a strong national policy favoring arbitration whenever the parties opt for that method of dispute resolution. *Houston General Insurance Company v. Realex Group, N.V.*, 776 F.2d 514, 516 (5th Cir. 1985). In light of the federal policy favoring arbitration, any written agreement to submit a dispute to arbitration should be liberally construed, and any doubt as to arbitrability of an issue should be resolved in favor of arbitration. *Austin Municipal Securities, Inc. v. National Association of Securities Dealers, Inc.*, 757 F.2d 676, 696 (5th Cir. 1985). See *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*, — U.S. —, 105 S. Ct. 3346, 3353-54 (1985); *Southland Corporation v. Keating*, 465 U.S. 1, —, 104 S. Ct. 852, 860 (1984); *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, 460 U.S. 1, 24, 103 S. Ct. 927, 941-42 (1983).

*Appendix C (Continued)—Memorandum Order of
United States District Court*

B. *The Effect of Dean Witter Reynolds, Inc. v. Byrd*

In *Dean Witter Reynolds, Inc. v. Byrd*, — U.S. —, 105 S. Ct. 1238 (1985), the Supreme Court held that a court may not deny a motion to compel arbitration of state-law claims pursuant to an arbitration agreement when a complaint raises both federal securities and pendent state claims. The court further held that the section 2 directive is mandatory:

By its terms, the [Federal Arbitration] Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.

Id. at 1241 (emphasis in original). See *NPS Communications, Inc. v. Continental Group, Inc.*, 760 F.2d 463, 465 (2d Cir. 1985); *Austin Municipal Securities*, 757 F.2d at 697.

C. *Waiver*

Frye argues that Paine Webber has nevertheless waived any right it may have had to compel arbitration. The court does not agree. First, the burden of one seeking to prove waiver of arbitration is a heavy one. *Tenneco Resins, Inc. v. Davy International, AG*, 770 F.2d 416, 420 (5th Cir. 1985); *Sibley v. Tandy Corporation*, 543 F.2d 540, 542 (5th Cir. 1976), *cert. denied*, 434 U.S. 824 (1977).

Second, the Supreme Court stated in *Moses Cone* that

the Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction

*Appendix C (Continued)—Memorandum Order of
United States District Court*

of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

Moses Cone, 460 U.S. at 24-25 (emphasis added).

Third, prior to the *Dean Witter* decision, a motion to compel arbitration would have been futile. Previously, the Fifth Circuit adhered to the doctrine of intertwining, see 105 S. Ct. at 1240, which dictated that if arbitrable and nonarbitrable claims were factually and legally inextricably intertwined, the federal court could retain jurisdiction over the entire case. See, e.g., *Commerce Park at DFW Freeport v. Mardian Construction Company*, 729 F.2d 334, 339 (5th Cir. 1984); *Smoky Greenhaw Cotton Co., Inc. v. Merrill Lynch, Pierce Fenner & Smith, Inc.*, 720 F.2d 1446, 1448 (5th Cir. 1983); *Miley v. Oppenheimer & Company, Inc.*, 637 F.2d 318, 334-37 (5th Cir. 1981). The court in *Dean Witter* expressly rejected the doctrine, see 105 S. Ct. at 1240-41, and held that the necessity of bifurcating proceedings did not eliminate arbitration as an alternative method of dispute resolution:

The legislative history of the Act establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate. We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims. The Act, after all, does not mandate the arbitration of all claims, but merely the enforcement—upon the motion of one of the parties—of privately negotiated arbitration agreements.

Id. at 1242.

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United States District Court*

The *Dean Witter* opinion was issued March 4, 1985. Paine Webber requested arbitration on April 3, 1985. Since the decision, Paine Webber has not participated in discovery, amended its pleadings, or otherwise acted to suggest waiver of arbitration. Consequently, Frye had not carried its "heavy burden" of establishing that Paine Webber waived its right to arbitration.

D. Securities Act of 1933

Frye argues that, even if *Dean Witter* requires arbitration of the pendent claims, her securities claims, founded on laws evincing a unique legislative intent to regulate securities transactions uniformly, must be resolved in a judicial forum.

In *Wilko v. Swan*, 346 U.S. 427 (1953), the Supreme Court held invalid agreements to arbitrate claims arising under the 1933 Securities Act. The court based its decision on three interrelated provisions of the 1933 Act. Section 12(2), 15 U.S.C. § 77l(2), provides a "special right to recover for misrepresentation which differs substantially from the common law action," which requires a judicial forum to assure its effectiveness. Section 22, 15 U.S.C. § 77v(a), provides for state and federal jurisdiction, nationwide service of process, and a wide choice in venue in federal court. Finally, section 14, 15 U.S.C. § 77n, voids any "condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision" of the 1933 Act. 346 U.S. at 430-31.

The *Wilko* Court ruled that an agreement to arbitrate "is a 'stipulation,' and . . . [that] the right to select the judicial forum is the kind of 'provision' that cannot be waived under § 14 of the Securities Act [of 1933]." 346

*Appendix C (Continued)—Memorandum Order of
United States District Court*

U.S. at 434-35. Thus, the *Wilko* court resolved the conflict between the policy favoring arbitration and the policy underlying the 1933 Securities Act in favor of the 1933 Act:

Two policies, not easily reconcilable, are involved in this case. Congress has afforded participants in transactions subject to its legislative power an opportunity generally to secure prompt, economical and adequate solution of controversies through arbitration if the parties are willing to accept less certainty of legally correct adjustment. On the other hand, it has enacted the Securities Act to protect the right of investors and has forbidden a waiver of any of those rights. Recognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies, we decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the [1933] Act.

Id. at 438.

In *Scherk v. Alberto-Culver Company*, 417 U.S. 506 (1974), the Supreme Court reaffirmed the validity of *Wilko* as to claims under the Securities Act of 1933 but declined to extend its reach to claims arising under the Securities Exchange Act of 1934. 417 U.S. at 511-15. The Fifth Circuit, on the other hand, has espoused the view that *Wilko* applies to claims under both statutes. *See, e.g., Sawyer v. Raymond James & Associates, Inc.*, 642 F.2d 791, 792 (5th Cir. 1981); *Sibley*, 543 F.2d at 543. Whichever reading of *Wilko* is correct, it is safe to say that at least any

*Appendix C (Continued)—Memorandum Order of
United States District Court*

of Frye's claims arising under the 1933 Act are not arbitrable.¹

E. Securities Exchange Act of 1934

Although the plaintiffs in *Dean Witter* urged § 10(b) and Rule 10b-5 claims, the Supreme Court expressly declined to consider the arbitrability of these claims.² Nevertheless, some guidance as to the court's view of the arbitrability of statutory claims was provided in its later *Mitsubishi* decision. The court there held that an agreement to arbitrate antitrust claims should be enforced if the agreement arises from an international transaction. 105 S. Ct. at 3361.

Although the instant case does not involve an international transaction, the *Mitsubishi* court seemed receptive to arbitration of statutory claims, noting that "we find no warrant in the Arbitration Act for implying in every con-

¹ The court is unable to discern, however, exactly what claims Frye may be alleging under the 1933 Act. Although the joint pretrial order submitted February 8, 1985 asserts that jurisdiction and venue exist under the 1933 Act (page 1), Frye's claims (pp. 2-11) explicitly mention the 1933 Act only once, in the context of "controlling person" liability for Paine Webber (p. 10). Similarly, her memorandum in opposition to arbitration filed November 26, 1985 refers to claims under the 1933 Act (pp. 102) but discusses only claims under Rule 10b-5 of the 1934 Act (pp. 16-21). It thus appears that most, if not all, of Frye's federal securities claims arise under the Securities Exchange Act of 1934. The arbitrability of those claims is discussed below.

² "Dean Witter and amici representing the securities industry urge us to resolve the applicability of *Wilko* to claims under § 10(b) and Rule 10b-5. We decline to do so. In the District Court, Dean Witter did not seek to compel arbitration of the federal securities claims. Thus, the question whether *Wilko* applies to § 10(b) and Rule 10b-5 claims is not properly before us."

*Appendix C (Continued)—Memorandum Order of
United States District Court*

tract within its ken a presumption against arbitration of statutory claims." 105 S. Ct. at 3353. Section 2 and the Arbitration Act as a whole manifest "a policy guaranteeing the enforcement of private contractual arrangements." *Id.*

After cautioning that not all controversies implicating statutory rights were proper subjects for arbitration, the court noted that the critical determination was whether Congress' intention as to the substantive protection afforded by a given statute, deducible from the text or the legislative history, was to include protection against waiver of the right to a judicial forum. *Id.*

Justice White, concurring in *Dean Witter*, suggested that section 10(b) and Rule 10b-5 are arbitrable. He reasoned that jurisdiction under the 1934 Act, restricted to the federal courts, is narrower than under the 1933 Act. *See* 15 U.S.C. § 78aa; 15 U.S.C. § 77v. Furthermore, the cause of action under § 10(b) and Rule 10b-5 is implied rather than express and more like the common-law action. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 380 and nn.9-10 (1983). Thus, solicitude for the federal judicial cause of action is less appropriate. 105 S. Ct. 1244.

After a review of recent decisions on this subject, this court concludes that Congress has not evinced an intent to preclude arbitration of claims arising under the 1934 Act. *See, e.g., Osborne v. Shearson Lehman/American Express, Inc.*, No. CA 3-85-1340-F (N.D. Tex. October 1, 1985); *McMahon v. Shearson/American Express, Inc.*, CCH Fed. Sec. L. Rep. ¶92,319 (1985 Transfer Binder) (S.D.N.Y. 1985); *Finkle & Ross v. A.G. Becker Paribas, Inc.*, Nos. 85 Civ. 1858, 85 Civ. 2284 (S.D.N.Y. December 2, 1985); *McKinney v. Sutton*, C.A. No. C-85-15 (S.D. Tex. November 8, 1985); *Byrd v. Dean, Witter, Reynolds, Inc.*,

*Appendix C (Continued)—Memorandum Order of
United States District Court*

No. 82-1655-T (S.D. Calif. July 8, 1985); *Finn v. Davis*, No. 84-8414-Civ.-Gonzalez (S.D. Fla. June 19, 1985); *Coonly v. Rotan Mosle*, No. A-83-CA-529 (W.D. Tex. June 11, 1985).

Accordingly, the court concludes that Frye's section 10(b) and Rule 10b-5 claims are arbitrable.

IV. *Stay Pending Arbitration*

Section 3 of the Arbitration Act provides for a stay of proceedings when an issue therein is referable to arbitration:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (West 1970).

Frye asserts that the litigation should not be stayed because defendants McGowan and George were not parties to the arbitration agreement. Under the Arbitration Act, however, an arbitration agreement must be enforced notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement. *Teñneco Resins, Inc.*, 770 F.2d at 422.

To control its docket, conserve judicial resources, and provide for a just determination of the case pending be-

*Appendix C (Continued)—Memorandum Order of
United States District Court*

fore it, *Moses H. Cone*, 103 S. Ct. at 939 n.23; *Contracting Northwest v. City of Fredericksburg*, 713 F.2d 382, 387 (8th Cir. 1983), a district court has inherent power to grant a stay of all proceedings pending arbitration. The Fifth Circuit rule is that "if some claims are arbitrable and others are not and they are easily severable . . ., the court should stay proceedings as to those claims which are arbitrable." *Coastal (Bermuda) Ltd. v. E.W. Saybolt & Co., Inc.*, 761 F.2d 198, 203 n.6 (5th Cir. 1985); *Wick v. Atlantic Marine, Inc.*, 605 F.2d 166, 168 (5th Cir. 1979); *Sibley v. Tandy Corporation*, 543 F.2d at 544.

The court concludes that the claims are not easily severable and that concurrent disposition would be inexpedient and judicially wasteful; consequently, the court orders a stay of all proceedings pending arbitration of the arbitrable issues.

V. Conclusion

For the reasons stated above, Paine Webber's motion to compel arbitration is GRANTED. All proceedings herein shall be stayed pending resolution of the arbitrable issues. The parties are directed to report to the court in writing the status of the arbitration within ten (10) days after a decision is made by the arbitrators or, in any event, by June 30, 1986.

So ORDERED.

December 26, 1985.

/s/ A. Joe Fish

A. JOE FISH

United States District Judge

APPENDIX D

Judgment of United States Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 86-1224

D.C. Docket No. CA-3-85-2335-R

GILBERT R. RUSSELL and CRINCO INVESTMENTS, INC.,

Plaintiffs-Appellants,

versus

SHEARSON LEHMAN BROTHERS, INC., LEON P. BOMAR, III,
and WAYLON MAX NIMMO,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Texas

Before CLARK, Chief Judge, REAVLEY, and WILLIAMS, Circuit
Judges.

JUDGMENT

This cause came on to be heard on the record on appeal
and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and
adjudged by this Court that the order of the District Court
appealed from in this cause is affirmed in part and re-

*Appendix D—Judgment of United States
Court of Appeals*

versed in part, vacated in part, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that costs on appeal be taxed equally against the parties by the Clerk of this Court.

November 13, 1986

ISSUED AS MANDATE: Dec. 5, 1986

GILBERT F. GANUCHEAU
Clerk

/s/ H. E. Adams, Jr.

H. E. ADAMS, JR.
Deputy Clerk

